



William Burrough, Clerk. - - - - Appellant.
Sir Francis Whichcote Bart. and } Respondents.
John Harding Esq; - - - - - }

The C A S E of the Respondents.



TH E Parish of *Great Chesbam*, in the County of *Bucks*, consists of two distinct Rectories Improprate; the one called *Chesbam Leicester*, and the other *Chesbam Wooburn*: And within the Rectory of *Chesbam Leicester* is a Chappel of Ease called *Latimers*, which has the Tythes of certain Closes within the Lordship of *Latimers* for its Maintenance; and the Lords of *Latimers* have been accustomed to appoint a Clerk to be Chaplain of the said Chappel.

TH E Appellant being about the Year 1703, appointed Chaplain of the said Chappel of *Latimers*, soon after set up a Claim sometimes to five, and sometimes to four Quarters of Wheat, and at other times to eight Pounds *per Annum*, to be Yearly payable to him as Chaplain of *Latimers*, out of the Rectory Improprate of *Chesbam Leicester*, and by some Means or other procured eight Pounds *per Annum* to be paid him by *Robert Gainsford*, the then Tenant of the said Rectory, for four or five Years after he first became Chaplain. But it is supposed, that this Payment was either made without the Knowledge of *Sir Paul Whichcote*, the Respondent *Sir Francis Whichcote's* Father, who was then seized of the said Rectory, or suffered by him to be paid to the Appellant, as a Gift or Charity, and not as due of Right; *Sir Paul* being of a very Charitable Temper, and a great Benefactor to the Clergy; and therefore very likely might permit the Appellant to receive this Money upon his promising to make his Right afterwards appear. But the Appellant failing to make out his Right in the Year 1708, this Payment was discontinued, lest Custom should make a Right to the Appellant which he had not before.

AN D though a Sum of twenty-five Pounds was afterwards left in the Tenant *Robert Gainsford's* Hands, on account of the Claims of the Appellant; yet that was not to be paid to the Appellant unless he should make out his Title thereto; and the said *Robert Gainsford*, the then Lessee of the said Rectory Improprate, and who and his Father had been Tenants of the said Rectory for upwards of sixty Years, and therefore well acquainted with its Rights and of all Payments issuing out of it, was so well satisfy'd that the Appellant's Demands were groundless, that he gave a Note to the said *Sir Paul Whichcote*, bearing Date the third Day of *December* 1713, by which he promised to pay the said twenty-five Pounds to the Chaplain, if it should be made appear that he was entitled to the same, and indemnify and save harmless the above-mentioned *Sir Paul Whichcote*, of and from the Payment thereof, and of and from all Damages, Costs or Charges, for or by Reason of the Non-payment thereof; and if it should not appear to be due to the said Chaplain, that he would pay the said Sum of twenty-five Pounds to the said *Sir Paul*, his Executors or Assigns.

AN D the Appellant having made no Proof of his Title to the same, the said 25 l. and other Arrears thereof were afterwards paid to the Respondent *Sir Francis Whichcote*, in *February* 1719, and the above Note cancell'd.

SIR

Sir Paul Whichcote, lived till 1721, and Gainsford till 1719, but no Suit in their Life-times.

S I R Paul Whichcote was seized of this Rectory for upwards of forty Years, and did not die till the Year 1721; and *Gainsford*, who had for a long time been Tenant as aforesaid, did not die till the Year 1719. But in their Life-times the Appellant did not think fit to commence any Suit, or use any Means to establish his pretended Right; being sensible that from the Knowledge they had of the Matter, it would be fruitless: And the several Stewards, who acted under *Sir Paul*, in receiving the Rents of this Rectory, and who knew whether any Payments of Wheat or Money had been made thereout, or not, to the Chaplains of *Latimers*, being also dead before this Suit was commenced, was another Advantage the Appellant gained by this Delay.

Trinity Term, 1723, Appellant's Bill to Establish his Right to five Quarters of Wheat, and for the Arrears.

The Appellant's Claim founded on a pretended Composition, 14th King John, and a Decree in Chancery, 25th January 1633.

S I R Paul Whichcote and *Gainsford* being both dead, and the Respondent *Sir Francis* young and unacquainted with the Nature of the Appellant's Demands in Possession of this Rectory, the Appellant exhibited his Bill in the Court of Exchequer, against the said Respondent *Sir Francis Whichcote*, and *Ann Harding* Administratrix of the said *Gainsford*, to establish his Right to the said five Quarters of Wheat, and for the Arrears thereof, and by his Bill founded his Claim thereto, on a pretended Composition or Agreement made the fourteenth of King *John*, between the then Lord of *Latimers*, and the Abbot and Convent of *Leicester*, by which he pretended it was agreed that the Chaplain of *Latimers* should have five Quarters of good Wheat yearly, out of the Grainge of the Abbot of *Leicester*: And on a Decree in the Court of Chancery, the 25th of January 1633, obtained by *Richard Balam* then Chaplain of *Latimers*, against *Thomas Ashfield*, who he pretends was then Impropiator of *Chesham Leicester*, under whom the Respondent *Sir Francis* claims, whereby he pretended it was decreed that the said *Thomas Ashfield*, his Heirs and Assigns should pay to the then Plaintiff, and his Successors for ever yearly, the said five Quarters of Wheat, and upon Custom and Usage, pretending by his Bill that the same, or four Quarters, or eight Pounds *per Annum* in Lieu thereof, had been constantly paid to his Predecessors.

The Respondent's Whichcote's Answer.

THE Respondent Sir Francis put in his Answer (and thereby set forth his Case to the Effect aforesaid) and denied the Appellant's Right, or that any such Composition or Agreement had been ever made, or that any Wheat, or Money in lieu thereof, had been constantly or ever (excepting to the Plaintiff for five Years as above-mentioned) paid by his Ancestors to his Knowledge or Belief.

Bill of Revivor on the Death of Ann Harding; and Answer by the Respondent John Harding her Executor.

AFTERWARDS (the said *Ann Harding* being dead) the Appellant revived the said Suit against the Respondent *John Harding* her Executor, who put in his Answer; and insisted, that if it should appear the Appellant was entitled to the said five Quarters of Wheat, the Arrears thereof ought not to be paid by him, but by the Respondent *Sir Francis*, as the said *Gainsford* and *Ann Harding* had paid the said *Sir Francis* all the Arrears of Rent due for the said Rectory.

THE Appellant having replied, and Issue being join'd, the Appellant examined several Witnesses, in order to prove the Usage or Custom of Payment of the said five Quarters of Wheat or Money in lieu thereof; but no Witnesses were examined on the behalf of the Respondents.

THE Appellant's Evidence consisted chiefly of a General Report and Hearsay, which (as it was above twenty Years from the Time of stopping this pretended Payment, to the Time of Examination of Witnesses) might have been raised and propagated by the Appellant himself; the Appellant living in the Parish, and the Respondent at a great Distance from it.

26th Nov. and 4th Dec. 1730. Cause heard, and Issues at Law directed.

THE Cause came on to be heard before the Barons of the Exchequer, when the Appellant did not offer to produce any Proof of the pretended Composition 14th King *John*, or that the Rectory of *Chesham Leicester* was the Grainge of the Abbot of *Leicester*; and he himself found his Proof of the Usage so very insufficient, that upon the second Day of Hearing, his Counsel only prayed for a Tryal at Law, that the Appellant might be at Liberty to prove his Right. And the

the Barons were pleased accordingly to refer it to a Tryal at Law, to be had at the then next Assizes for the County of *Bucks*, on these Issues, *viz.* Whether five Quarters, or any other, and what Quantity of Wheat, had been antiently and yearly due and payable by the Impropiator or Impropiators of *Chesham Leicester*, or by his or their Tenant or Tenants, to the Chaplain of *Latimers* for the Time being; and whether any, and what Sum of Money, had been yearly paid in lieu thereof, by the said Impropiator or Impropiators, or his or their Tenant or Tenants, to the Chaplain of *Latimers* for the Time being: And that after the Tryal had, such further Directions shou'd be given, as shoud be Just.

Verdict for
Respondents.

THE Appellant was so far from being dissatisfy'd with the said Decree, that instead of Appealing therefrom, he deliver'd a Declaration, and went on to a Tryal of the said Issues directed by the Court of Exchequer at the last Lent Assizes for the County of *Bucks*; where, after a full Hearing, and to the Satisfaction of the Judge of Assize, the Jury brought in a Verdict for the Respondents.

1731. The
Bill dis-
missed with
Costs.

ON the hearing the said Cause on the Equity reserved, the said Court of Exchequer dismissed the Appellant's Bill with Costs, both at Law and in Equity.

FROM which the Appellant has Appeal'd to your Lordship's, for that the said Court of Exchequer refused to read the said Decree and Proceedings in the said Court of Chancery, in the said Cause between *Richard Balam* and *Thomas Ashfield*; and insists, that if the same had been read, it would have made out the Appellant's Demands, and that then no such Issues ought to have been directed, but that he ought to have been decreed the said Wheat and the Ar-rears thereof.

BUT the Respondents humbly conceive, That the said Decree and Proceedings in the Court of Chancery, ought not to be read in Evidence against the Respondents, and that the said Decrees of the Court of Exchequer are just and proper, for the following Reasons (amongst others.)

1st,

FOR that it is the constant and known Practice of the several Courts of Law and Equity, not to permit any Decree or Order made in any Cause in any other Court, to be read as Evidence, without first producing the whole Proceedings in such Cause, that the Court may be inform'd upon what Foundation such Decree or Order had been made, and whether the same had been fairly obtain'd upon Defence and Debate of the Matter, or by Surprise or *Ex parte*. And the Appellant did not produce any Answer of the said Defendant *Ashfield*; and there being no Recital in the Decree, the Court could not be inform'd by any Thing but the Acts of the then Plaintiff, what was the Matter then in Dispute, whether the said *Thomas Ashfield* was at that time Impropiator of *Chesham Leicester*, or whether he put in any Answer, or made any Defence, or whether the said Decree had been fairly obtained.

2ndly,

FOR that it would have been unjust in the said Court to have permitted a Decree made against the said *Thomas Ashfield*, to be read against the Respondent *Sir Francis Whichcote*, as a Purchaser of the Rectory impropriate of *Chesham Leicester* under him, without the Appellant's first shewing that the said *Thomas Ashfield* was, at the Time of making the said Decree, seized of the Rectory impropriate of *Chesham Leicester*, and that he was apprized of the said Suit, and had put in his Answer, and made his Defence.

3rdly,

FOR that if the said Court had permitted the said Decree in Chancery to have been read, the same being against the said *Thomas Ashfield*, would have been no Evidence against the Respondents, or Charge upon the Rectory, without shewing, that the said *Thomas Ashfield* was at that Time Impropiator; and the same having been obtain'd near a hundred Years since, the Appellant ought to have shew'd a Submission thereto, and a Continuance of Payment, by the several succeeding Impropiators, to the several succeeding Chaplains, in order to have establish'd his Right thereby: Which, as he fail'd to do, the Respondents conceive, that if the Court had permitted the said Decree in Chancery to have been read, yet the directing the said Issues would have been in this Case very proper, and the most the Appellant could have expected. And if

that

that Decree had been proper Evidence in Equity, it would have been so at Law, and he might have made use of it, and had the full Benefit of it at the Tryal: But as he did not attempt to read it there, from a Sense that it was not proper Evidence, so he does not in the least complain of any Injustice done him there, or of a Verdict against Evidence.

Fourthly, FOR that the directing Issues touching Matters of Fact, whereof the Court is in Doubt, is what is usual in the like Cases, and proper to inform the Court of such Matters as are necessary to be ascertain'd: And the said Court having directed such Issues in this Case which have been found against the Appellant, the Respondents therefore humbly hope, and insist, That the Decree of Dismissing the Appellant's Bill with Costs is right.

WHEREFORE for these, and divers other Reasons, the Respondents humbly hope, That your Lordships will be pleas'd to Dismiss the Appeal with Costs.

P. Yorke.
D. Ryder.

William Burroughs, Cl. Appel.

Sir Francis Whicbroke,

Bart.

AND

John Harding, Esq;

Respondents

THE
Respondents CASE.

To be heard at the Bar of the House
of Lords, on *Monday* the
17th 1731. Day of March,